IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION,

Plaintiff,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

CA No. 12-1726
Washington, DC
January 28, 2015
9:40 a.m.

TRANSCRIPT OF MOTION HEARING (Video Conference)
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

COURTROOM DEPUTY: Civil Action Number 12-1726, Landmark Legal Foundation versus the United States Environmental Protection Agency. Counsel, can you please come forward and identify yourself for the record.

MR. FERGENSON: Good morning, Your Honor. Arthur Fergenson, Ansa Assuncao, LLP, for Landmark Legal Foundation.

MS. GRAHAM-OLIVER: Good morning, Your Honor. Heather Graham-Oliver, representing the EPA in this matter. Also at counsel table is Jennifer Hammitt, counsel for the agency, and Kevin Miller.

MR. FERGENSON: Your Honor, also at counsel table for plaintiff and movant are Michael J. O'Neill, Richard Peter Hutchison and Matthew C. Foris, all of Landmark Legal Foundation.

THE COURT: All right. You may proceed.

MR. FERGENSON: Thank you, Your Honor. On Landmark's Motion for Sanctions, Landmark has attempted to fully brief the issues, many of which have been previously argued by me extensively before this Court. Landmark is also aware, as I am personally, that this Court took the available evidence and marshaled it carefully, considering what it felt was important and the inferences to be drawn therefrom in issuing its order directing that Landmark be entitled to take limited discovery in this case. In that regard, Landmark has

attempted to provide as full a record to this Court as possible, given this Court's prior actions in reviewing the record.

Almost none of what has been discovered would have been discovered or disclosed to Landmark or to this Court but for this Court's discovery order and this Court's marshaling of the evidence and then our actions, Landmark's actions, in taking discovery. And what we have found, very quickly, although we have attempted to marshal it in our papers, and I will say it quickly.

While this Court was told that -- and Landmark -- that EPA always knew that our FOIA request covered the administrator and deputy administrator, and they did know that, but the advice given originally on what the deal was, and this the Court noted in finding questions that needed to be answered in its order ordering discovery. In reporting on the deal to the general counsel and others responsible for the FOIA request, the deal excluded, because it did not include the administrator or deputy administrator. Then when the search was sent originally to everyone but the FOIA coordinators for the administrator and deputy administrator, it similarly executed the administrator and deputy administrator.

If EPA always knew that the deal with Landmark included the administrator and the deputy administrator, then

the communication to the decision makers and to the FOIA communicators as to what to search for, excluding the administrator and deputy administrator both in the terms of the search and in the offices communicated with, was a falsehood. And given EPA's statement that it always recognized that it was a knowing and intentional falsehood by EPA. The effect was to shield at least for a 22-day period any review of the records of the administrator or deputy administrator.

In order to obtain relief from this Court, relief that was obtained, which was an extension of time to file the Motion for Summary Judgment, the EPA provided disclosure that included a nondisclosure of a material fact, which would have been relevant to a reasonable decision maker's conclusions as to whether to grant the relief. The test, as I understand it for nondisclosure, and I'm thinking of the 10b -- 10b-5 is that nondisclosure constitutes fraud on the decision maker when it would have been part of the decision maker's process -- whether it would have been a material part. What was not disclosed for the extension was that no search of the deputy administrator's file had ever been made.

Let me state now that at no time during these proceedings or in any of the material reviewed by Landmark or provided to this Court have we concluded that the Department of Justice has taken any improper action, and that includes

the conduct of Ms. Graham-Oliver, which has always been professional, correct, it has been a pleasure to work with her, as should be the case in opposing counsel. All these comments go to EPA and its employees who are responsible for the falsehoods placed before the record of this Court.

In order to defeat relief from this Court --

THE COURT: Before you get off on that track too far, it does bother me that statements that we now know were false, like that one, were not corrected with the Court. The Court, I understand, authorized this discovery, but the Government never came forward and admitted these things to the Court and withdrew things that were not true. I think that stands through today.

MR. FERGENSON: That's correct, Your Honor. And repeatedly before this Court in oral argument and in papers we have made that point. So, we've given them multiple chances to take away false statements that were submitted on the record and under oath before this Court.

THE COURT: They have not done so because I notice in the latest filings they have -- I mean, I just read Newton's deposition last night. Newton said nobody ever searched anything in the deputy administrator's files before April, which is five months, and yet they are still arguing that that is not true. Now we've got a deposition from Newton saying that, I'll hear their argument, but I don't understand

with Newton's testimony how they can take that position, do you?

MR. FERGENSON: I don't, Your Honor. It appears to me that they are operating on the -- it depends what "is" is type of interpretation of what constitutes a search.

THE COURT: That's not --

MR. FERGENSON: -- but they defined what a search is. In each of the filings they said this is what we did. No records response. We went to every office, and in every office they defined search as a no records response report or no responsive documents report or the documents. They said they got that response from everybody, but then at the last minute they found out that they may need to have done another search. That was false.

It was a false statement -- that for months we have said was a false statement. We said it in the depositions, we said it was a false statement. And you're right, Your Honor, there had been nothing received, and Mr. Wachter admitted that in his deposition. Mr. Newton also testified there had been no search that they're aware of of the deputy administrator's files at all. That would have been material. Now --

THE COURT: Well, in light of the deposition I read of the former administrator, she said the logical person who was dealing with Sunstein in the OIRA, the White House and OMB, the main person dealing on these subjects was the deputy

administrator, so his files would have been the most important of all to search and they didn't search them.

MR. FERGENSON: They did not search the deputy administrator at all until the fire drill -- what we called the fire drill events -- when it was within, I think, a little over 24 -- between 24 and 48 hours when they realized that no search had been accomplished, a string was provided and then they stood over -- I think Mr. Newton, and said -- and said, do this search, and they did the search. But there had been no search -- this Court was not told that when there was an extension. Whether this Court would have granted the extension or not is, under nondisclosure of material facts, irrelevant.

And the three declarations by Mr. Wachter contained materially false information designed to end this case without the thousands of documents they have provided. One of them was to oppose a preliminary injunction issued by this Court that we opposed. And what he did, what Mr. Wachter said is, we've issued a litigation hold. We are adhering to that litigation hold. We will do every action necessary to preserve documents. You do not need to issue this preliminary injunction. And this Court relied upon that. In fact, for two months nothing was done that was a falsehood.

I think this Court can infer from the record, not only in this case but from prior actions of EPA, that there

was never any intention to preserve documents as required under the litigation hold which covered ESI, electronically stored information, in personal devices, including BlackBerrys. No action was taken. In fact, that litigation hold was never sent to the administrator.

That was the second falsehood and they won. They won because they lied. I am reminded of a book that I still have on my shelf, which is Sissela Bok's *Lying* in 1978, the daughter of two Nobel Prize winners. And that's what this case is about. It is also, and I was reminded of this as well this morning, this Court can, and I would argue, ought to consider this case in the context of what happened now, I guess 14 years ago, it was 13 when this started, and as this Court recognized, provided an important predicate to this case, which is EPA's contemptuous non-preservation of documents during the transition.

THE COURT: Well, part of the --

MR. FERGENSON: It's part of the Samuel Beckett play where the actors repeat exactly the words that they said the first time through.

THE COURT: Well, part of what influenced me in not granting the preliminary injunction was the games EPA played 14 years ago when they deliberately did not give my order to the key people to carry it out, and then the key people could not be held in contempt because they were never given my

order.

So, I thought the stay that the agency itself was willing to do was more likely to be carried out than any injunction I issued, in light of the games they have been playing with the Court.

MR. FERGENSON: And in this case, as opposed to that case, as we point out in our papers, EPA went to great lengths to try to get the documents back immediately. And as I think this Court -- as we've tried to lay it out -- we have tried repeatedly to get information from the EPA. What's happening? Where are the documents? What happened with this? E-mail after e-mail after e-mail that I sent requesting it.

And until the filing of the opposition to our motion we got nothing. We didn't know that all of the text messages and all of the e-mails on BlackBerrys had been erased between February 15th and 18th. It was accompanied before that with a warning. That is in the declaration. So that Mr. Wachter and his staff would have each received a warning that all of the ESI on these PDAs, on the BlackBerrys, would be gone as of February 15th to 18th.

And since they read and understood -- Mr. Wachter said, I understood it, my staff understands it, we're going to protect it. That said that forwarding is insufficient for a litigation hold. It comes to spoliation. They adopted it. Now, in the papers from EPA, they say, well, if we went too

far -- but they went what they thought they had to do under the circumstances, and they incorporated it in this case as an obligation that they undertook and presented to this Court. We didn't see that litigation hold.

In fact, it took two months from the Government -- from EPA's pledge before this Court to provide the litigation hold to us for us to get it and repeated requests for it. The reason is, I think, that it shows that their principal defense, which is really a Federal Records defense, not a spoliation defense. They said, well, we forwarded everything. We would have forwarded everything. But as the litigation hold says, that is irrelevant.

Now, the Government periodically tries to make this a Federal Records Act case. It is not. If they had to preserve it or didn't have to preserve it before the date when spoliation obligations took hold is of no consequence. If it was there, then it had to be preserved. This is not an FRA case.

So, we have the knowing and intentional falsehood from the EPA about there having always considered -- they knew that the administrator and deputy administrator were covered. We have the knowing and intentional falsehood presented as a fraud on this court in the failure to disclose in the filing of no search of the deputy administrator's files, the search as they defined it, not a search as Ms. Shaw said, which is,

you know, the tree falling in the wilderness with no one there. They did not disclose that. They said they needed more time because there were, you know, they found that they, you know, it may have been inadequate. There was no search of the DA.

There was an intentional fraud on the Court when, in order to defeat the motion for preliminary injunction, there was a statement that a full search had been made but ultimately was inadequate, and that's why they needed more time and that's what they did. This was repeated in the declaration from Mr. Wachter, an intentional knowing fraud on the Court filed by EPA, also in pursuit of the Motion for Preliminary Injunction.

Except for the initial direction by Mr. Newton reporting on the deal that it only covered AAs, that it didn't include the administrator -- deputy administrator by its terms, every other piece of information was withheld from the Court, would not have been disclosed, except for discovery, and, I mean, they would have gotten away with it. They did not get away with it. And for that, this Court's order and our discovery in pursuit of that order, is responsible.

Now, in marshaling the evidence, the silos, although they intermingle, and I apologize for using the cliche of silo, in the lines of wrongdoing are spoliation, destruction of documents. Fraud on this court through false

communications, that after repeated advice in depositions and in argument before this Court, we have said: Correct it. Correct it. At some point, even if it was a mistake, and I don't believe so, hardens into an intentional fraud by EPA on this court.

And the delay, the delay that originally caused this Court to question the narrative provided by the EPA in its Motion for Preliminary Injunction. And the time line that we've tried to provide is that we had our FOIA request, it was limited, but never substantively. Let me also state that, and I've made this point before, Your Honor, the limitation by EPA as set forth in both Wachter declarations, that responsive documents were deemed to be only those documents where delay was for political reasons meant that no search had ever been done to respond to Landmark's FOIA request before the research that was agreed to by EPA. Not one. Because EPA, of course, would never do anything political, and that was their judgment. So they incorporated their interpretation of Landmark's motives into the search even though it wasn't in the terms of the search. No search was ever done, if a search is defined as finding and producing responsive documents.

Litigation hold on October 23rd, 2012. December 12th, Motion for Injunctive Relief. April 30th, Motion for Extension of Time to File, following the fire drill where they realized there had been no search at all of the

deputy administrator's documents. And May 15th, 2013, Motion for Summary Judgment with a follow-on reply, both containing declarations by Mr. Wachter.

THE COURT: Now, who was the person responsible for that phrase being inserted "for political reasons" in their terms of their search?

MR. FERGENSON: That was Mr. Wachter's declaration. Both of his declarations in connection with the Motion for Summary Judgment stated that responsive documents -- that the responsive documents would be produced where there had been delay of rules and regulations, where it was done for political reasons. The same three words were in both paragraphs.

THE COURT: That was --

MR. FERGENSON: Now, who ordered that, I don't know.

THE COURT: Okay. Mr. Wachter's, his position at the time?

MR. FERGENSON: Pardon me.

THE COURT: Mr. Wachter's position at that time?

MR. FERGENSON: Yes. And he, as the person responsible, I think he was head of OEX -- is that correct? He was head of OEX, it was his office, it was his responsibility, it was his declaration.

THE COURT: And he was in the administrator's

office?

MR. FERGENSON: Yes. I don't think he was in the immediate office, but he was in the administrator's office. The administrator's office was the administrator and the deputy administrator, and their personal staffs, including Mr. Dickerson and Ms. Shaw, who were the coordinators for FOIA requests for the administrator -- then administrator -- and for the then deputy administrator, both of whom have now moved on.

THE COURT: So, the bogus determination that it had to say "for political reasons" was by Mr. Wachter or someone above him?

MR. FERGENSON: Yes.

THE COURT: Was he asked?

MR. FERGENSON: Was he asked that? No.

THE COURT: Go ahead.

MR. FERGENSON: There has much discussion of -- I think, Your Honor, I mean, the defenses I think are few. I think I've dealt with the search. The search that didn't happen really did happen because Ms. Shaw who was, let's see, she was asked after the 22-day delay, she was sent the request to search. And, of course, the search was, if you remember this, we're not giving you search terms, these are some of the things you might look for, we're not giving you search terms.

Although, in the 24 to 48 hours during the fire

drill, general counsel's office, which had been earlier involved in this, and for good reason, given this Court's actions and the history with Landmark 14 years ago, everyone knew, and they knew or should have known, that took them -- and they got a search string together.

Now, in the short period of time, I think it was about 36 hours, by memory, that Mr. Dickerson had after the 22 days, what he did was, he went in to the administrator, Ms. Jackson, and said: Do you remember anything about this? And she said: No. No response. So, it was memory to Ms. Jackson. There was nothing from Ms. Shaw. And then as e-mails show -- in December? Tickled. Where is it? In January? Tickled: Where is it?

She sent an e-mail, you know, there's something -- am I supposed to do something with the Landmark FOIA? And she gave -- there was a complete absence of an official no documents found or documents. She says she found documents but she couldn't figure out how to load them. So, the claim by Mr. Wachter to this Court in declarations that have the force of a sworn statement of truth to this Court today, months after his deposition, months after our filings, months after hearings in which I said: Are you going to substitute it? I didn't hide that argument before the EPA. It has not been claimed. He said: We got a response. This was our system. We got a response from everybody. It was either no

documents or documents. That was a lie.

Now, there's some discussion about spoliation, which is in the order of -- well, we don't know the relevance of the documents spoliated because they're not here and because we have the oral testimony that, you know, I didn't do this, or if I did it, and we have substantial testimony from the administrator, I complied with the Federal Records Act by forwarding everything into my secondary account, the Richard Windsor account. Not true.

When confronted with a document from her BlackBerry -- and this is the LisaPJackson@verizon.net, Exhibit 24 in our motion to our memorandum, and Exhibit 4 in the depositions. When she was confronted with sending an e-mail from her BlackBerry to eight people, including the current administrator, Gina McCarthy, but not to Richard Windsor. She said, well, I didn't send it to everybody. Even if I didn't send it to Richard Windsor, it went to eight or nine accounts. Which ones, we don't know.

What we do know is that she said she gave her -- and this is at Pages 25 to 28 of her deposition. I didn't use text messages to do government business in general. My practice was to send things to the Richard Windsor account so they could be appropriately captured for government recordkeeping. Of course, the practice to avoid spoliation is to preserve them regardless of forwarding from the litigation

hold that, of course, was not sent to Ms. Jackson. The first one.

The second one after she left was purportedly sent to her. And that would have been after the BlackBerrys had been wiped between February 15th through 18th. All information in the BlackBerrys were wiped.

I don't recall -- also, there was no audit, there was no review of her personal e-mail practices or of her BlackBerry practices. She also testified that because text messages are sent, she talked about her government phone number. The Government phone number would have been used to send her text messages. How many people had it? Page 26. People in corporations, people in the environmental movement, people in government, people in non-profits, people in academia, my family. I have one phone number so if my kids wanted to call it, and we erred in including family and tying her next -- her continuation of that to the corporations, people in environmental movement, people in government, people in non-profits, people in academia. But all of these people had her e-mail.

She did not follow her practice in forwarding information from her BlackBerry, and all of the information resident in her BlackBerry was destroyed. We also note a finding in connection with FOIA. The very first sentence by Judge Collyer: Administrators of the EPA, a finding against

the EPA, have made prolific use of government issued Smart phones to send thousands of text messages.

Relevance. Spoliation can be presumed from bad faith or gross negligence. Relevance, likewise, it would be impossible for a party to prove the relevance of nonexistent documents. And what we have here is a pledge to this Court through the litigation hold that was secret until May, a pledge that we would follow the litigation hold and preserve all ESI that was potentially relevant on all personal devices in government hands.

And the relevance, because the substance was never reduced, the relevance was quite wide. It would include people in corporations, in environmental movement, in government agencies, her list was extremely broad. She said it was essentially the same list as for her e-mails, which was oodles, lots. It beggars the imagination, given what we were able to find, that it would not have included potentially relevant documents. Bad faith from all quarters.

The serial lies, the history of the actions from 14 years ago, the failure to take remedial action that was taken 14 years ago, all point to the requisite bad faith, the requisite gross negligence and more, that show not only spoliation but relevance and importance. As I've told the Court before -- and I'd like to now turn to the relief.

The very purpose of the FOIA request was to find

documents that could have reflected the myriad -- the truth of the myriad of public reports. So, it's not a fishing expedition and it did not come from newspapers that one would have expected or news sources that one would have expected to go out of their way to support Landmark.

That there was a political agenda, whereby rules and regulations would be slow ruled in the run-up to the 2012 election to enhance the reelection of President Obama. Well documented. We provided that. We cited to it. This was a reasonable request. And they kept it from, as this Court noted, the deputy administrator, who had the dealings with Mr. Sunstein at the White House and the administrator, who, when it was kicked up to her level, she would deal with them until all of the text messages, including any pleas for relief or pleas against relief from the environmental movement.

Why are you doing this? Are you trying to aid the election? We'll support him anyway, but don't do this to us -- were gone from her BlackBerry. Were gone because they were deleted en masse from her personal e-mail account, native on her home computer. Gone.

On remedies. The day that EPA, through Ms. Graham-Oliver, stated that they agreed -- said before this Court, they said they agreed to do another search and to negotiate the terms, was a sufficient change in position so that Landmark at that point would be entitled to, at this

Court's discretion, attorneys' fees and costs.

THE COURT: I agree.

MR. FERGENSON: If nothing more is imposed on EPA then -- and this is not a Federal Records Act case, so you know, that they are going to do better with a Federal Records Act is irrelevant. Something more has to be followed, otherwise they get a free pass. It's free. They can spoliate because, as the Government -- as EPA notes, relying on this Court's opinion in Alexander, there can be no monetary sanctions against EPA itself other than explicitly provided through a waiver of sovereign immunity through attorneys' fees and costs. And we can only have one reasonable set of the attorneys' fees and costs.

Now, what other sanctions would be available that do not involve monetary sanctions? An order of spoliation. Finding that spoliation occurred with a detailed, as this Court did, you know, in its prior order, detailing the reason for the spoliation order so that the world might know. And that's not going to change EPA's attitude, and it doesn't really help us. Although, it may help other litigants.

We believe that this Court, under these circumstances, extraordinary circumstances, including the vouching of the truth of intentional falsehoods by not removing them from the Court file would be to provide the equivalent of what the Court could do if Landmark were seeking

anything but the documents, which is the default judgment. The ultimate, you know, the death penalty in cases. We can't get a default judgment.

We can get summary judgment, but that would leave us only with attorneys fees and costs, but we can get a finding that under these circumstances, insulating the administrator and deputy administrator, the background -- as this Court noted of the administrator and deputy administrator's central role in dealing with the issues that we were focused on, a finding that EPA engaged in the practice or that these stories were true, that there was a delay of rules and regulations for the purpose of aiding the election of the President.

It didn't mean that the President was responsible for it, but it does mean that the EPA, as an equivalent of what I believe we would be entitled to if monetary damages were a remedy. That's the death penalty remedy.

THE COURT: Well, let me ask you. On that point, have you received in discovery anything that actually supports a factual finding that that's what happened regarding EPA's reasons for their decision-making and the lead-up to the election?

MR. FERGENSON: We received our last omnibus production on January 8th of this year, 4,256 pages. In the review to date we have not found any such document.

THE COURT: Okay.

MR. FERGENSON: It is an extraordinary finding, but in the absence of any other default relief, we would ask that this Court consider that relief. Then we would ask that this Court direct EPA, another nonmonetary sanction, to advise all other parties in litigation with EPA since 2009 of the finding of this Court of spoliation, if their rights have been deprived. If they were in discovery and they were told no documents exist in litigation, including FOIA litigation, they should be informed. And they should conclude whether any settlements entered into or judgments entered against them are subject to reopening because of the practice of spoliation.

That is also a nonmonetary sanction. Then we come to the vindication of the power of this Court. Under Shepherd and under this Court's opinion at 272 F.Supp 2d 70, et seq., the prior case, this Court says or wrote: This Court has the inherent power to protect its integrity and to prevent abuses of the judicial process by holding those who violate its orders in contempt and ordering sanctions for such violations.

Ordering EPA in contempt, civil contempt, would provide some vindication of this Court, but it didn't work last time and it doesn't get us anything. It is a pinprick. The other option under the inherent power --

THE COURT: There was a day when contempt of court was a serious offense, but that day seems to have come and

gone for the Government.

MR. FERGENSON: It has.

THE COURT: At least in my court.

MR. FERGENSON: The other is under the inherent power of the Court under Shepherd and under Landmark versus EPA is criminal contempt. Under the Rules of Criminal Contempt under the inherent power, neither Landmark can prosecute, nor in this case since the defendant is the Government represented by the Department of Justice, the Government could not prosecute.

This Court would then have to appoint an independent prosecutor to determine whether criminal sanctions would be appropriate. It is an extremely difficult -- it's difficult to ask for. I have never asked for it. I think it would be -- it's within the very limited reliefs that are appropriate for this court. It could embrace an investigation and possible prosecution for criminal contempt of those people who were personally responsible, criminally responsible, if any, for the intentional knowing falsehoods placed by EPA before this Court and vouched for through today. It would be an extraordinary step to take.

I don't think I'll be around 14 years from now when the Beckett play repeats itself again. I regret this. All we wanted was our documents. And I fear that in the absence of something, you know, that this Court has dealt with affronts

to its integrity before and it's aware of the tools that it has to vindicate its authority. I think here the number, the sequence, the purpose that can be discerned from this, the protection is -- and the history is extraordinary. We say this with regret.

There were not only -- this is EPA -- a number of the individuals are lawyers, that is also mentioned in Shepherd. And an investigation by a prosecutor -- independent prosecutor named by this Court to vindicate its authority under the criminal contempt could, in its review, consider their actions. I believe that the prosecutor could assert that the crime fraud exception is available to find out who told what to whom, and to try to penetrate the -- I was told this by that person and I relied upon this.

I do not think EPA's attitude toward this Court -- it certainly didn't change during the course of this litigation -- that EPA's attitude to Landmark has not changed over 14 years. EPA -- I know I've said this before to the Court -- and I was a prosecutor, I was in the Executive Branch for a period of time, I served as a clerk in the Judicial Branch, every person and entity that stands before the Government seeking its rights deserves respect regardless of what their political views are.

I think Landmark was treated as the enemy in this. It may be a reflection of traits that are general in society.

But when we come in front of a court, we are no longer the enemy, and we should not have been the enemy in EPA. Our disagreements will be played out in the process, and this Court should have been treated with a great deal of respect. I regret this. I would have rather had the documents and not be standing here in front of the Court today. Thank you, Your Honor.

THE COURT: Let me ask you a couple of other questions. One is on that idea that you seem to agree with what I first said about vouching with these, but not withdrawing the oral statements. Do you have any research or any case law on that that would help me in looking at that question?

MR. FERGENSON: No, Your Honor, beyond the -- I can try to find it, but I believe that there's a general obligation before courts to correct any misstatements, and it may fall under the general rubric. We can try to find it. Now, what I did, Your Honor, I placed on the record both at depositions and at hearings before this Court, if memory serves, stating that they had not corrected it and urging them to correct it.

THE COURT: Yes, you did. But I guess in light of my inability to put my finger on some case law on that, and maybe I'm going to create some, but maybe you can help me create it. That is very troubling to the Court. That even if

you're no longer relying on the present motion, that you can just leave a false affidavit on file with the Court and do nothing about it. That troubles me.

MR. FERGENSON: Yes, Your Honor. And here, not only was -- as this Court knows, I talk a lot, and I don't try to hide my strategy, and I put that on the record. I said: This is false. I put it on the record in hearings. I said -- at the last hearing, I think -- I think there were two or three before this, I said, they have left it on file. They were given notice. That, to my mind, when I said they've not changed it, so they are re-upping. They are vouching. I think that adds to this.

I think there's a general obligation of a litigant to be appropriate with the Court and to correct mistakes. I'm sure this Court has had litigants before it who have said: I was wrong. This affidavit was incorrect. I'm substituting an affidavit. I think that's the best way to do it and I think there's an obligation -- a general obligation. And to leave an affidavit after its been shown to be false and pointed out that it's been left constitutes an endorsement or a vouching of the fraud.

I don't know, have we -- we can look further and find authority. And I think that it is support of -- it certainly shows bad faith. It certainly shows that Landmark has given them and this Court has given them every opportunity

to come clean and they haven't.

Again, this is not the responsibility of the Department of Justice, this is all EPA -- always EPA. And they were present, it's been on the record, that by not correcting it -- we said, correct it, and they chose not to. Not one. Not the filing with this Court when they got the -- when they got the extension, with the material nondisclosure which constituted a fraud in this court. Not the denial of the preliminary injunction.

So, they had the opportunity to wipe clean the BlackBerrys of all native information e-mails and text messages and not the declarations that they filed and left in place by Mr. Wachter, the three declarations by him. First for the -- we're doing everything we can, Your Honor, we're going to abide by the litigation hold. And then the other two, which is, we really have done it. When it was inadequate, we found out about it, and we went back. Those two, to get summary judgment, which if this Court had not acted would have ended the process. Everything would have been secret.

Everything would have been not disclosed, including the litigation hold, including the wiping of the text messages, which was only disclosed now, even though we asked again and again. Everything would have been fine. The enemy would have been kept out of the gates, Landmark being the

enemy.

THE COURT: Now --

MR. FERGENSON: And, as it came, this Court as well.

THE COURT: Now, one other question. What has happened since the last filing? Is there now a search you all are agreeing on or what is the status of that?

MR. FERGENSON: After extensive negotiations, search terms and protocol -- or search protocol was agreed to. There were delays. So far upon -- there was a production -- there was a briefing book production on August 29, 2014, it wasn't briefing books, it was 108 pages. The daily reading files from the administrator consisting of letters to administrator from outside groups on actions or pending rules, including the American Lung Association, State Department of Environmental Quality and others.

There was a briefing books production which didn't actually have briefing books. On September 20th, 2014, 755 pages talking points for meetings with group outside of the EPA, background information on individuals meeting with the administrator, reports by outside groups for the administrator to read, and letters from outside groups and proposed pending rules.

For example, the City of Albany's Mayor writing to express support for the Mercury Air Toxic Standards. There

was a notice luxe production, a full set, of what they considered responsive of 3,304 pages. Also, on September 20th, paper and other files of 89 pages, and a Vaughn index of 828 items. In our review -- to date of the January 8th production, this month of 4,256 pages. We have no basis to believe that that review is ongoing.

We have no basis to believe or to assert that that was not a production that complied with the protocol. Of course, it excluded all of the documents that had been destroyed, including all the text messages -- including all the text messages from Gina McCarthy, which was in Judge Collyer's decision, she was one of the senior administrators during this period of time, and all of hers were destroyed, thousands and thousands of text messages. We have cited to her opinion, and they were gone as well. And they weren't all -- it is not reasonable to assert that they were all e-mails with personal friends setting up luncheon appointments, family or alumni get-togethers.

They were in the business of communicating. And to give Administrator Jackson credit, she wanted an open government. That was her belief. That was her philosophy. And she practiced that. If you're going to have open government where you give your telephone number so you can get texts from hundreds of people and e-mails from hundreds of people, then there is a concomitant responsibility that should

have been institutionalized, especially after the commencement of the litigation.

And before I end, one point that I want -- that we make in our briefs. The documents that were not preserved included any documents that were text messages or e-mails reflecting the adequacy of the search. We got some. We got the initial instruction. This is our deal, it covers AAs and ADAs and these other people. We had that Newton memo. We have the instruction to everybody but the administrator's assistant, administrator's FOIA coordinator or the deputy administrator's FOIA coordinator. This is what it covers, this is how you search, but it only covers these same people then covered the administrator or DA. We have those.

But what we don't have is the evidence that would be included -- excuse me, Your Honor -- in the text messages, in the e-mails that were destroyed, sometimes en masse, of other actions of wrongdoing, and this Court can rely upon that as well -- and asked for that production, and that production was relevant to the underlying determination of a good faith adequate search. Those documents weren't preserved. So, it's not only the merits, but it's the adequate search. There are two prongs to the documents destroyed.

THE COURT: All right. Thank you, Mr. Fergenson.

MR. FERGENSON: Thank you, Your Honor.

THE COURT: If you want to, the Government, before

you start, if you want to take a brief recess for everyone's convenience, we can do that?

MS. GRAHAM-OLIVER: Yes, Your Honor, I would appreciate that.

THE COURT: We'll take a short recess.

BRIEF RECESS AT 10:38 A.M.

AFTER RECESS

MS. GRAHAM-OLIVER: Thank you. Your Honor, the motion in front of the Court is about spoliation, and Landmark has the burden of proving spoliation. To do so, Landmark must establish that the EPA destroyed evidence that was relevant to the parties' claim; two, caused Landmark prejudice; and, three, was done with a culpable state of mind. Landmark has not carried its burden on any of these elements.

On relevance, Landmark has not pointed to and cannot point to any evidence showing that the EPA destroyed documents that would have been responsive to Landmark's FOIA request. This is true both with respect to subject matter, i.e., one, communications from outside groups regarding proposed regulations; and, two, delay of regulations because of the upcoming 2012 elections, as well as time period, January to mid-August 2012.

In fact, all available record evidence indicates that no such documents ever existed either on personal e-mail accounts or as text messages. On prejudice, Landmark cannot

point to anything concrete. Even assuming the destruction of relevant documents, Landmark has not articulated how it was prejudiced by this destruction. For example, the destruction of a personal e-mail would not be prejudicial if the same e-mail was also captured in agency systems, as was EPA's policy and as individual employees have testified in doing.

Similarly, the destruction of text messages would not be prejudicial given the likelihood that whatever substance was being discussed would likely be captured in some other agency system as well. The consistent testimony has been that text messages are inherently not well-suited to conduct business as proven by the BP Oil spill text message that was discussed in the deposition testimony of Ms. Lisa Jackson.

On culpable mental state, Landmark offers no basis for concluding that any individual EPA employee acted in bad faith. Landmark spends a significant amount of time rehashing over and over and over again issues related to the past processing of Landmark's underlying FOIA request. Those mistakes do not rise to the level of bad faith conduct warranting sanctions.

The EPA has corrected any errors made in the first search and has agreed to a new search, has conferred with Landmark about the search terms and scope, and has produced records as a result of this new much wider search. There's no

indication that things were lost or destroyed --

THE COURT: Is that search --

MS. GRAHAM-OLIVER: -- in the interim.

THE COURT: Is that search now completed?

MS. GRAHAM-OLIVER: I'm sorry.

THE COURT: Is the new search now completed?

MS. GRAHAM-OLIVER: The new search is completed, Your Honor. The issues related to the past processing of records are not relevant to the present spoliation motion, nor do they cast doubt on the EPA's good faith. The sworn testimony of both Ms. Jackson and Mr. Perciasepe is that text messaging was not used for substantive business purposes.

Lisa Jackson testified that she did not nor would she violate federal recordkeeping requirements. It was her practice to ensure that she did everything she could to comply with federal laws to ensure that records were managed properly. She testified that it was her responsibility to ensure that she did not do anything that would hinder the efforts of the offices to perform their functions under all the records requirements that they had to adhere to.

In light of that --

THE COURT: She also testified --

MS. GRAHAM-OLIVER: -- she did not think it appropriate to use text messages.

THE COURT: She also testified that no one ever

told her that she had any obligation to forward this stuff from her PDA or text messages. She ended up doing some of the PDA and none of the texts, as I understand it. I'm less troubled by the text messages, I will say, than I am with things on their BlackBerrys because that could be full text -- e-mails that would be much more troublesome.

And your argument that they can't prove what was destroyed, why is it their burden to do it? The burden is on the agency when you don't produce something that is requested under FOIA. Why isn't it your burden to show what you destroyed.

MS. GRAHAM-OLIVER: Two things, Your Honor. On the BlackBerry, the only thing that would have been destroyed would have been the text messaging because the e-mails were on EPA servers. Those were never wiped or destroyed.

THE COURT: Not if it was her personal e-mail.

MS. GRAHAM-OLIVER: Her personal e-mail -- she testified that whenever her personal e-mail may have been used in any way, she would forward those personal e-mails into an EPA account. That was her sworn testimony.

THE COURT: Okay. That's one employee. How about all the others who corresponded by PDA on personal e-mails about agency business? Have they ever been asked if they agree with what she did and they did what she did? Does anyone know? Are you saying that's the plaintiff's obligation

to go find that out?

MS. GRAHAM-OLIVER: In spoliation, Your Honor, it is the plaintiff's burden to find -- the plaintiff has to carry the burden of proof in the spoliation action, Your Honor.

THE COURT: All right. You want me to authorize him to take depositions of all those people now, because it's his burden to prove that somebody didn't send their personal e-mails in?

MS. GRAHAM-OLIVER: No, Your Honor. We have a declaration from the FOIA records individual who has spoken with these individuals, and said that in fact it was their practice as well to forward any e-mails on their personal account into an EPA account. And, in fact, that is how we got here today. That's because they in fact did do that and there were e-mails with personal e-mail accounts, but they had been forwarded into EPA accounts. And there is no evidence that Landmark has unearthed that would be contrary to that.

THE COURT: What affidavit are you talking about?

MS. GRAHAM-OLIVER: I'm talking about the affidavit of Larry Gottesman, it was attached to our opposition motion.

THE COURT: Go ahead. If you want to get that.

MS. GRAHAM-OLIVER: He spoke with 17 senior officials, and he received information from each senior official regarding the use of text messaging or personal

non-agency e-mail accounts. Each individual was asked whether to the best of their recollection they used text messaging to send or receive information about rules or rule making in January through August 2012, or if they used personal e-mail accounts to send or receive information about rules or rule making in January through August 2012.

Individuals either met with him personally, contacted him by phone or sent him an e-mail. All senior officials questioned replied that to the best of their recollection they did not use text messaging to discuss rules or rule making in January through August 2012. A few officials indicated that they would use their personal e-mail account for business purposes if remote access to the agency's server was not operating or if there was a need to print at another location, such as at home.

However, these officials all stated that the records were captured in EPA's Lotus Notes e-mail system, either because they were forwarded into the EPA's system consistent with the EPA's policy or already in EPA's system if sent from the employee e-mail address to a personal e-mail address for printing.

THE COURT: All right.

MS. GRAHAM-OLIVER: There is no evidence that --

THE COURT: Was he deposed?

MS. GRAHAM-OLIVER: No, he wasn't, Your Honor. He

was not deposed. And, Your Honor, neither was -- Landmark decided that they were not going to depose Nina Shaw either. Now, it is absolutely incorrect that there was a material misrepresentation with respect to Eric Wachter's affidavit. Mr. Wachter testified to what he knew at the time, not what Mr. Newton knew, but what he knew at the time.

And what was it that he knew at the time? He knew at the time that there was something amiss about the search because the program offices had returned e-mails pertaining to the administrator, and yet there was a no response in the administrator's office. That was what he knew at the time. And as a result, a supplemental search was done. A supplemental search of everybody was done. The search was of the administrator, the deputy administrator and the chief of staff's office.

Now, this supplementary search indicates that there was good faith on the part of the agency. It was done prior to the motion for summary judgment being filed. It does not indicate that there was any lying, there was nothing to hide. What was evident was that Mr. Wachter was aware that another search was necessary, and in fact, it was accomplished.

If the Court desires any supplemental briefing on this issue we will be glad to accommodate that. But the evidence is that Mr. Wachter signed a declaration with respect to what he knew at the time.

Ms. Jackson -- the testimony --

THE COURT: I'm sorry. So, therefore, you have no reason to withdraw his affidavit because you believe it is true? That's your position?

MS. GRAHAM-OLIVER: My position, Your Honor, is that Mr. Wachter believed that it was true at the time that he signed the declaration.

THE COURT: He now knows it was not true, correct?

MS. GRAHAM-OLIVER: No. Mr. Wachter's declaration in Paragraph 15 states that the initial document collection was closed on January 25, 2013, and this is Document 5510, it was filed September 12th, 2014, and it's on Page 7, Paragraph 15. He states: The initial document collection was closed on January 25th, 2013. At that point my office had either received a no records response or had coordinated the collection of documents from the immediate office of the office of the administrator and from assistant administrators, deputy administrators and chief's of staff in the EPA's office of water, et cetera, et cetera.

When he says that he received either a no records response, that was with respect to Eric Dickerson and the administrator's records. When he talks in terms of he had coordinated -- his office had coordinated the correct collection of documents from the office of -- from the immediate office of the office of the administrator, this is

true. What had happened was that Eric Wachter knew that Mr. Newton had sent a request to former deputy administrator, Bob Perciasepe's office, asking for records, and he had sent a request to the chief of staff's office asking for records on November 14th, 2012.

THE COURT: But he's saying that there was a no response from the deputy administrator, but Newton testified no one asked the deputy administrator and there was no search at that time.

MS. GRAHAM-OLIVER: Newton testified that to the best of his knowledge at the time a search had not been done of the deputy administrator's office.

THE COURT: All right.

MS. GRAHAM-OLIVER: But whether Eric Newton knew that at that time is not clear, and in fact, I don't believe he did know that.

THE COURT: You're saying he did not make up, someone told him to lie, that the deputy administrator had been searched. So, he wasn't lying, someone else told him that and it was a lie? What are you saying?

MS. GRAHAM-OLIVER: No, I'm not saying that. I'm saying that he testified to what he knew at the time. That's all I'm saying. At the time --

THE COURT: If he testified --

MS. GRAHAM-OLIVER: -- in an affidavit to what he

knew.

THE COURT: He testified the deputy administrator's files had been searched; that's what he said. The office of the administrator, which included the deputy, had been searched. That's what he said and that is false. Am I right?

MS. GRAHAM-OLIVER: Well, at the time Nina Shaw -- and she has not been deposed -- but Nina Shaw sent an affidavit, signed an affidavit, saying that she had searched the deputy administrator's office in January.

THE COURT: That's not what Mr. Newton says.

MS. GRAHAM-OLIVER: Mr. Newton was not aware of the search.

THE COURT: You don't want to admit that that's false. You don't want to admit Wachter's affidavit is false. Fine. We'll see where we go with that. Go ahead. What's your next argument about false affidavits?

MS. GRAHAM-OLIVER: Your Honor, the EPA's Office of the Inspector General investigated EPA's practice and procedure with regard to the use of personal e-mail accounts and determined that there was no evidence to support the claim that EPA used, promoted or encouraged the use of private e-mail accounts to circumvent records management responsibilities.

THE COURT: If you want to rely on that, is there a reason you haven't given it to the Court?

MS. GRAHAM-OLIVER: The reason that we haven't given what to the Court?

THE COURT: The IG report to the Court.

MS. GRAHAM-OLIVER: It was produced in discovery, Your Honor.

THE COURT: Well, that doesn't do me any good, does it? You haven't filed it.

MS. GRAHAM-OLIVER: Okay. I can produce that to you, that's no problem.

THE COURT: If you're going to rely on it, you better.

MS. GRAHAM-OLIVER: Okay. In addition, Your Honor, Ms. Jackson stated that, you know, when she was asked about any communications between the Office of Information and Regulatory Affairs and herself and whether those communications were in writing, her quote is found on Page 20 of our opposition, but specifically she says there was never a memo or anything that said that for these reasons, which those reasons were for political reasons, we are not going to approve this rule for political reasons.

Mr. Perciasepe testified that OIRA never indicated to him in his calls or his meetings that -- please don't do this rule because somebody in the White House told me to do it or not to do it. That never happened. That's the record -- that's the testimony in this case. There's no other testimony

that we can assume occurred.

THE COURT: Now, to be clear about that question, I was asking you before -- since it seems you want to have a trial, you don't want to concede that the deputy administrator was not searched for five months. You're claiming today the deputy administrator was searched in January, that's what your claim is today?

MS. GRAHAM-OLIVER: Yes, Your Honor.

THE COURT: All right. And Mr. Newton's -- Mr. Newton's testimony at his deposition is wrong?

MS. GRAHAM-OLIVER: Your Honor, Mr. Newton was not aware of the search because the records were not uploaded in the database. And as Ms. Shaw testified, she had problems with uploading the records to the database. She contacted a program office and asked how best to search for the records in January. They sent her their search and how they did that search, and she duplicated that search. But she testified in her affidavit she was having problems uploading those records, and that's why Mr. Newton testified that to his recollection he did not see any documents on the database with respect to the deputy administrator's records.

But, Your Honor, there's no evidence, again, that the deputy administrator's records were spoliated. Those records were there. They were produced in the production on May 15th. There's no evidence in the record to indicate that

there was any spoliation of the deputy administrator's records.

THE COURT: I thought their representation was that in moving for the enlargement of time with me a false statement was made that there had been a search of the deputy administrator and that was not true?

MS. GRAHAM-OLIVER: Your Honor, again, we can provide supplemental briefing on that issue, if you desire. But our position is that Mr. Wachter at the time testified to what he knew to be true, and his focus at that time was, again, on the no response -- the no response from the office of the administrator.

THE COURT: Go ahead.

MS. GRAHAM-OLIVER: And, again, Mr. Newton only testified to what he knew as well. The spoliation -- the EPA also has done a more recent third search that was accomplished that included 72 unique specific search terms that were mutually agreed upon. And as Landmark has stated, it took some time to negotiate those terms, but the EPA basically -- and Landmark came out with a search term that included those 72 unique terms and went forward and has completed the search and the production under the third search, which again evidences that there was no spoliation of the records. The records that were on the EPA system remained on the EPA system. There's no spoliation of those or any other records

for that matter.

Ms. Jackson testified, yes, that she gave out her cell phone number to oodles of people, but that was so, in her testimony, that they could call her. She wanted people to call her because she believed that as a public servant, being accessible to people she served, was important. She did not conduct business, though, through her BlackBerry or through text messaging.

The litigation hold that was sent in October and then again in August indicates that was an indication of good faith. The litigation hold was not ignored. There was no reason to believe that any responsive documents were on the BlackBerry, and those responsive documents would have been texts on the BlackBerry or within personal e-mail accounts that were not forwarded into the agency accounts. Since there was no reason to believe that any relevant responsive information was in a BlackBerry or personal account that was not in an agency account, there was no reason to ask to search those locations or to hold them. The scope of the litigation hold was for relevant responsive information.

THE COURT: Well, I compared the October 23rd litigation hold to the August 20th, 2013 litigation hold, and I did note that in the later one the agency did preserve -- indicate that the general counsel reiterated, you must preserve all communications, and our records related to this

FOIA request in your possession and control, including any records and personal e-mail accounts or on personal devices that document agency business or relate to your work on agency rule making activities.

That's very helpful and very worthwhile to put in that level of detail, but that was not in the original litigation hold, the wording was much more ambiguous, right?

MS. GRAHAM-OLIVER: Well, Your Honor, yes. The wording in the initial litigation hold was different than the second litigation hold. However, the agency's policy with respect to personal e-mails was that if there was any agency business that was done on personal e-mails it was to be forwarded to agency accounts. And that is why the agency accounts were the ones that were searched.

THE COURT: Where was that requirement?

MS. GRAHAM-OLIVER: That is in -- let's see. Your Honor, in June of 2013 the EPA issued the Interim Records Management Policy where EPA also provides -- which provided that those records should be forwarded into EPA accounts.

THE COURT: But in October 2012 there wasn't any such requirement?

MS. GRAHAM-OLIVER: It was more or less a practice of the individuals, particularly the high level individuals. Ms. Jackson and Mr. Perciasepe both testified that that was their practice in October 2012 and preceding that that had

always been their practice. So, there isn't any other evidence that would contradict that. That was their practice all along.

THE COURT: Of those two.

MS. GRAHAM-OLIVER: And from what we know, with respect to the 17 other assistant administrators in the program offices, they, too, had that practice.

THE COURT: All right. In 2012?

MS. GRAHAM-OLIVER: In 2012, Your Honor. Your Honor, also, EPA has filed a supplemental notice of --

THE COURT: I saw that. So it's now the law.

MS. GRAHAM-OLIVER: It's now law, yes. So, as you know, on November 26th, 2014, the President signed into law the Presidential and Federal Records Act Amendment of 2014. And this new law clarifies the responsibilities of federal government employees when using nonofficial electronic messaging accounts for government business. And that approach codifies EPA's approach to using such accounts in the conduct of agency business, as captured in EPA's June 2013 Interim Records Management Policy.

And, as testified to in this case, including the practice of forwarding information from nonofficial electronic messaging accounts to official accounts. The EPA is intending also to update its Interim Records Management Policy to include the 20-day limit that is specified within the Act.

The EPA also intends to update employee training and guidance to include the new time limit and other provisions of the Act.

In the 2012 and 2013, EPA required all employees to take mandatory records management training and plans to continue this annual training requirement. The agency has always instituted a quarterly records management day with reminders sent by the office of the administrator and the acting chief information officer to promote good records management practices and to highlight specific issues.

In June of 2013, the EPA issued the Interim Records Management Policy --

THE COURT: Where do I find it?

MS. GRAHAM-OLIVER: -- EPA also provides individual records training to political appointees when they join the agency. The Office of Inspector General performed an audit of EPA's practices with regard to personal and secondary e-mail accounts and found that there was no evidence that EPA was using these accounts to circumvent FOIA.

The Office of Inspector General is now initiating an audit based upon a request from Congress of US EPA processes for preserving text messages.

THE COURT: Where do I find the interim policy?

MS. GRAHAM-OLIVER: The interim policy was attached to the Motion for Opposition.

MR. HAMMITT: I believe so.

THE COURT: To the opposition?

MS. GRAHAM-OLIVER: To our opposition, yes.

THE COURT: Okay. All right.

MS. GRAHAM-OLIVER: To the declaration of Lisa Hearns.

THE COURT: Okay.

MS. GRAHAM-OLIVER: Hearns. H-E-A-R-N-S.

THE COURT: Can I make one friendly suggestion that you can pass along to the new administrator.

MS. GRAHAM-OLIVER: Yes, Your Honor.

THE COURT: That training is something that she should sit in on since Lisa Jackson testified that she never got any training or instruction, knew nothing about any of these requirements. Maybe the new administrator would be well advised to take the training course.

MS. GRAHAM-OLIVER: Yes, Your Honor.

THE COURT: Just a friendly suggestion.

MS. GRAHAM-OLIVER: Your Honor, I do want to reiterate that the administrator did testify that it was her practice, however, to forward into EPA's accounts any records pertaining to EPA that were on her personal e-mail accounts.

THE COURT: But, according to her, she just dreamed that up on her own, she was never told by the agency to do that.

MS. GRAHAM-OLIVER: In any event, Your Honor,

there's no indication from this record that any of -- that she destroyed, that she did not follow her general practice of forwarding e-mails into her account. She also testified on Page 42 in her deposition that she was instructed -- it's Page 42, Line 10 through 18. Page 42, Line 5 through 18.

Question: Did you have any policy about preserving e-mails on your personal account? Answer: Can you be more specific? Are you talking about when I was at EPA? Question: When you were at EPA? Answer: So, what I was instructed to do was to make a practice, which I did, of forwarding any e-mails, which could be construed as pertaining to government business or government records, into the EPA system so that they could be captured and preserved there, because that was what I was instructed and told was the way to handle those situations. And there are examples, many, of me doing exactly that. That is Ms. Jackson's sworn testimony.

THE COURT: Okay. Maybe Ms. McCarthy got the same instruction then.

MS. GRAHAM-OLIVER: Yes, Your Honor. The so-called "for political reasons" limitation. Your Honor, there are two parts of the Landmark request. Part one was for any and all records identifying the names of individuals, groups and/or organizations outside the EPA with which the EPA was having communications of any kind relating to all proposed rules and regulations that were not finalized by EPA between

January 1st, 2012, and August 17th. This did not include public comments.

Part two dealt with any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and all public comments of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

Part one, regarding the discussions with outside parties was deemed to be responsive to part one regardless. Any discussions with outside parties were deemed to be responses to part one regardless of the content. And there wasn't any screen with respect to part one. Records were produced. The quote, "for political reasons" so-called limitations, represents EPA's reasonable and good faith attempt to interpret part two of Landmark's vague request.

It clearly stated that they wanted regulations that -- records indicating an order, directional suggestion that the issuance of regulations should be delayed or slowed until after November 2012 or the presidential elections of 2012. It is a reasonable suggestion that part two, the delay, was for political reasons. In fact, in deposition testimony the question was asked that I started out with, and that was whether there was any indication in the communication between OIRA and Ms. Jackson and Mr. Perciasepe about a delay, quote, "for political reasons." So, it was entirely

reasonable for that spin to be placed on the second part of the EPA -- of the request.

However, we have again entered into a third search, if you will, and we have negotiated with Landmark, we have asked Landmark to cooperate in giving us search terms and in providing the outside organizations that Landmark thought was pertinent with respect to the search. And we have understood now that it's not just for political reasons, but initially that term -- those terms were EPA's reasonable and good faith attempt to interpret part two of Landmark's vague request.

Also, in --

THE COURT: There was no -- if I may. There was no search prior to the third search now that didn't include that term "for political reasons"?

MS. GRAHAM-OLIVER: No. That's correct, Your Honor. There was just the supplemental search and the third search.

THE COURT: The supplemental search still included -- it had to say on its face "for political reasons"?

MS. GRAHAM-OLIVER: Okay. It was never a part of the search, it was a part of the production. It was never a part of the search, Your Honor. In other words, it wasn't a limitation on the search. It was not a limitation on the search.

THE COURT: I have never seen -- and I thought you

could not now produce what the actual instructions were for the search; is that not correct? I thought no one could come up with the actual wording of what the search instructions were for that first search or for the supplemental search.

MS. GRAHAM-OLIVER: Your Honor, I think in Exhibit Number 1 -- excuse me.

THE COURT: Okay.

MS. GRAHAM-OLIVER: In Plaintiff's Exhibit 1, and this is the e-mail that Jonathan Newton sent out to everyone pertaining to Landmark's request, there was no limitation or "for political reasons" within that e-mail. It simply stated: Request description, records relating to proposed rules and regulations that have not been finalized by EPA between January 1st, 2012, and August 17th, 2012.

The second bullet is records reflecting an order, direction or suggestion that regulations or comments on regulations should be delayed until after November 2012. And there was no added sentence about "for political reasons." Therefore, the search itself was not restricted or in any way -- it just pertained to Landmark's request.

When the records came in, it's my understanding that when the records were sorted through, that's when the "for political reasons" wording came into play, which is not all together unreasonable given the actual language of the request.

Again, that was only for part two of the request, not for part one. Your Honor, Landmark has brought up an issue with respect to Judge Collyer, and that issue pertains to Judge Collyer's factual findings -- Judge Collyer's decision in the CEI case. In that case the defendant filed a motion to dismiss, a 12(b)(6) motion to dismiss. Judge Collyer has not made any factual findings in that case. She simply concluded that CEI's allegations were plausible enough to survive a 12(b)(6) motion to dismiss.

The issue with respect to Gina McCarthy in that case pertained to information that was produced in response to a different FOIA request and does indicate that during a three year period of time the assistant administrator, which was Gina McCarthy at the time for the Office of Air and Radiation sent approximately, during a three-year period of time, sent approximately 5,000 text messages that were sent or received on a mobile device that was assigned to Ms. McCarthy. However, only 120 of the text messages during this three-year period were exchanged between her device and a device assigned to another EPA employee. The remainder of the text messages were exchanged with phone numbers belonging to family members, friends, personal acquaintances.

It is the agency's understanding that the messages exchanged with EPA assigned numbers were also personal in nature, not substantive schedule or -- or non-substantive

schedule related. Plaintiff has stated in its reply that it has developed all of the evidence that it needs. There is no basis for their request to depose any other EPA employees, including Ms. McCarthy and other officials.

Your Honor, may I have a minute.

THE COURT: Sure.

MS. GRAHAM-OLIVER: Thanks. Your Honor, I do want to mention that there was -- that there was no intent and, in fact, there was no exclusion of the administrator. The request went directly to the office of the administrator, and Jonathan Newton is the FOIA coordinator for the office of the administrator. The FOIA request went directly to Jonathan Newton to coordinate with other FOIA coordinators in other EPA program offices and that's exactly what he did. The administrator's office was not excluded, neither was the deputy administrator.

The testimony is simply that the request went directly from Jonathan Newton to his counterparts in the other program offices, and that Jonathan Newton sent then the request on to the assistant -- the assistants, the staff assistants, for the former administrator and the former deputy administrator. There's no evidence that in the interim there was any destruction of documents or spoliation.

THE COURT: No, he just apologized that that 22 delay was his own fault, that he never gave it to the

administrator.

MS. GRAHAM-OLIVER: Yes, Your Honor, probably because of his work schedule. But there's no evidence that there was anything -- no spoliation, no destruction of documents during that period of time, there's just --

THE COURT: But it just so happens that -- it just so happened that was a big chunk of the time left before the election, but that was just an accident, I guess.

MS. GRAHAM-OLIVER: Jonathan Newton did -- there was no evidence that was discovered in discovery that one could even imply from that that the election had anything to do with the fact that there was that 20-day period of time in which he sent the FOIA request. There's just no evidence there.

Your Honor, Landmark has stated or made comments about the memory of Ms. Jackson, that somehow Aaron Dickerson's request to Ms. Jackson of whether or not she knew was somehow improper. But, in fact, Aaron Dickerson I think was actually doing the right thing when he went to Ms. Jackson. And he not only searched her records, which he did do, he didn't rely on her memory all together, but he also went to her with the FOIA request and asked her if she had any of the records that were described in the FOIA request, and she said that she didn't recollect having any of those records.

Your Honor, there is -- again, there's absolutely no evidence or any other basis in which -- and plaintiff never mentioned it in his brief in terms of a criminal contempt. And there's no basis upon which this Court can hold the EPA in criminal contempt. And I just wanted to indicate that Landmark, as far as I could tell in their briefing, has not mentioned anything about criminal contempt.

THE COURT: Well, clearly, the agency could not be held in criminal contempt but individuals who provide false affidavits or false testimony to a Court certainly can be held in criminal contempt.

MS. GRAHAM-OLIVER: And, Your Honor, as stated previously, there's absolutely no evidence to indicate that the -- that Mr. Eric Wachter did not believe what he was saying when he said it in his affidavit. Landmark's case has become unmoored from his origins of FOIA and have now mutated into a freeform inquiry of EPA record management with no boundary.

In spite of hours and hours of the deposition testimony, Landmark has uncovered no smoking gun. In fact, they never asked the salient question to either Ms. Jackson or Mr. Perciasepe, the salient question being: Did they receive any documentation, text message, any e-mail that went to their personal e-mail accounts that would have indicated that an order or direction or suggestion that the issuance of

regulations were to be slowed or delayed until after November 2012. Or did they receive any documentation, again, in their personal e-mails or texts regarding the names of individuals or organizations with which the EPA consultants have had communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January and August 17, 2012. They never -- Landmark never asked those pertinent questions. So, in spite of hours of deposition testimony, Landmark has uncovered no smoking gun here.

THE COURT: Wait a minute. I would assume that they would not think this is like Perry Mason and that those people are going to confess on the stand. And I would assume you could have asked those questions if you wanted them asked. So, I don't know what your point is.

MS. GRAHAM-OLIVER: There's nothing on the record that would indicate that anything relevant was spoliated. That's the point, Your Honor.

THE COURT: All right.

MS. GRAHAM-OLIVER: There simply is no evidence that any text message or e-mail on personal e-mail accounts existed that was responsive to Landmark's FOIA request and was unlawfully destroyed, and therefore, the EPA and the Government is asking that the motion should be denied.

THE COURT: All right. Last question. At the end

of the day if the plaintiffs are now not contesting the adequacy of this most recent search, then this case is going to be at an end. Do you concede that they would be entitled to attorney' fees for having prevailed, and so that all of this becomes more or less only fodder for how much the amount of the fees is?

MS. GRAHAM-OLIVER: May I consult, Your Honor, with agency counsel?

THE COURT: Sure.

MS. GRAHAM-OLIVER: Thank you.

OFF THE RECORD

MS. GRAHAM-OLIVER: Your Honor, we concede that they have prevailed, but we cannot concede entitlement and other issues pertaining to the reasonableness of the fees.

THE COURT: What does entitlement mean? What would be the issue there?

MS. GRAHAM-OLIVER: Just a minute, Your Honor.

THE COURT: Sure.

MS. GRAHAM-OLIVER: Your Honor, we do not have the actual four-part test in front of us, but there is a four-part test that the circuit has set forth for entitlement of fees, and we would at least like to take a look at that and possibly brief that issue -- those issues.

THE COURT: All right. All right. I was just seeing if I could short circuit anything. All right. Thank

you very much. Anything else you want to add?

MS. GRAHAM-OLIVER: No, Your Honor. Thank you very much.

THE COURT: All right. All right. The plaintiffs get the last word.

MR. FERGENSON: Okay. Thank you, Your Honor. The standard for entitlement, I believe the four-part standard is: A, benefit of the public; B, commercial benefit to plaintiff, plaintiff is not a commercial entity; C, nature of complainant's interest in the records sought, which is high and consistent. And EPA keeps saying how much we've -- how much they've learned from this, I'd say that's a benefit to the public. And whether the Government's withholding of records had a reasonable basis in law. That's the four-part test, I believe, Your Honor.

I before I get to the issues, I'd like to respond seriatim to the points we rely upon, Pension Committee, Judge Scheindlin's extensive decision on burden and showings necessary to prevail and to obtain relief in spoliation cases. We've cited to the appropriate language in our brief and to the Pension Committee cite. And relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.

I would ask this Court, as I predicted, to recognize that what EPA is doing is to conflate their Federal

Records Act management practices which preserves documents for open government purposes, to protect against destruction of matters that should be preserved and available for the public, if and when it's appropriate, with spoliation.

This is not a Federal Records Act case and their documents and their reference was all Federal Records Act. What they don't talk about is spoliation in the litigation hold memorandum. The litigation hold memorandum, upon which EPA relied, and said, we would follow this as two things, and ultimately produced to us in May of this past year. It says everything on a PDA, personal device, personal electronic device, including BlackBerrys, everything, is electronically stored information.

And, two, whatever the Federal Records Act may suggest about preserving documents in a central repository where they can be archived and preserved. According to National Archives regulations under the Federal Records Act, that's got nothing to do with spoliation. In fact, the litigation hold memorandum says: This is serious. You cannot get around from preserving e-mails on your personal e-mail device on your BlackBerry or anywhere else on the grounds that you've purportedly forwarded it to somebody else or to a central repository. That is not what is required.

The litigation hold memorandum makes clear what EPA tries to smudge, which is -- forget about the Federal Records

Act, if you got a document, and wherever you sent it it's on your e-mail and it's potentially responsive, you've got to preserve it. And there's a reason, Your Honor.

The testimony, repeatedly, is that there was no audit of any e-mail, personal e-mail accounts, it was on your honor and no checking. It's like the memory test, which is now being applied to three years ago. Do you remember any -- you know, did you ever ask that these be slow rolled or do you remember any conversations? That is not enough. There was no audit. There was no review.

But the litigation hold was quite specific -- all of the Federal Record Act requirements and reforms and we'll really do it right this time, is irrelevant to the issues before this Court, except insofar as it reflects on EPA's sloppy management, and that may reflect on its failure to adhere to the litigation hold memorandum.

But all e-mails and text messages residing on the BlackBerrys were wiped out between February 15th and February 18th. And it is not quite accurate to say that my memory -- the administrator said that she didn't do any government work with text messages. It was -- I'm aware of the representation by counsel for EPA that Ms. Collyer's use, except for however many, 270 of the 5,400 or so text messages, were with family or exchanging telephones number. Here it was she gave her phone number, which would have been the way to

give text messages to people in corporations, people in the environmental movement, people in government, people in nonprofits, this is Ms. Jackson, people in academia, and my family. My family came last on the list.

I am not an early adopter. I don't do text messages, but almost everyone I know under the age of 40 or even 50 uses text messages, and text messages can contain substantive information that is preserved. They can say, you know, why don't you get -- why don't you get those regs out, are you waiting for the election? Or just: Why don't you get those regs out?

There is substantial communication by text messaging, and that is what Ms. Jackson testified to. I don't have any recollection of that. Did you ever say in short that -- this is Page 25 of her deposition at Line 3. Did you ever make the same request -- this is the Richard Windsor account, her secondary account, with respect to text messages, whether they be on the BlackBerry or otherwise available, that they go to the Richard Windsor account. Did you ever say in short: Make sure you search my text messages. This would be to her deputy or to her personal assistant. I don't have any recollection of that.

So, he didn't search text messages. The man who was the FOIA coordinator. I can't imagine that I would have -- can't image -- because I didn't use text messages to

do government business in general. That is not the flat denial. The procedure -- the Federal Records Act procedure was not obeyed by her. She said: That was my practice. And that's the evidence we have. She said everything there but, of course, not anything disclosed to us. But we found -- and this is Memorandum Exhibit 24, Deposition Exhibit 4, it's discussed at Page 52, where she sent from her BlackBerry an e-mail. Now, that would have been on the e-mail server of EPA, but her Federal Records Act practice was to send everything to Richard Windsor. No.

This one was not sent to the Richard Windsor account, it would not have been subject to search, given -- following the Federal Records Act, she did not follow the practice. And then she said, well, you know, I would send it to maybe eight or nine people. That was enough. We also have her reference in Exhibits 34 through -- 34, that is Deposition Exhibit 34, the "Lisa at Home", that was her personal e-mail account, where she asked -- where she gave out her home e-mail, as above, in a business-related communication.

So, I would ask this Court to focus in on text messages -- have become -- and now they are even being abandoned by people in their 20s or 30s, but that is the mode of communication. I prefer e-mails, but text messages were very active, and that was her testimony. There was no audit or review of those.

Now --

THE COURT: Can I ask both sides to do one thing for me. I was very annoyed in reading these depositions last night, that in my set of them I did not have any of the deposition exhibits. I don't know if in fact they were filed when you filed the depositions as attachments or not, but in any event I didn't have them. So, it was hard to follow some of the depositions.

MR. FERGENSON: And I apologize for that, Your Honor. At the hearing that we had in front of the Court, we handed the Court a full set of what were then the deposition exhibits, and I think that covers everything. If I may, let me ask my colleagues, did we cross-reference memorandum exhibits with the deposition exhibits?

THE COURT: That flew out of --

MR. FERGENSON: All right. I apologize, Your Honor, but if you look -- all -- I think all of the exhibits that we deemed appropriate in our memorandum, we gave sequential numbers for the memorandum, and then we also cited to the deposition exhibit number. That is not quite the same, we probably should have given you a cross-reference from the deposition exhibit into the memorandum exhibits, and we can provide that to the Court if that would be helpful. Any objection from the Government?

THE COURT: I think they have the same -- well, I

don't know if they had any depositions, maybe they are all yours.

MR. FERGENSON: I think all of the exhibits are from us. We gave you a cross-reference from the memo back into the depositions, we can provide it further --

THE COURT: That part of the file --

MR. FERGENSON: -- a cross-reference without any argument from the deposition exhibits into the memorandum exhibits. But they are also -- they should also be available in that large binder that we provided the Court, but we can --

THE COURT: That's not a problem, I can get that binder, but it's in D.C., not here.

MR. FERGENSON: Okay. We can provide and file it by letter or other appropriate device to get it to the Court as a supplemental filing.

THE COURT: All right.

MR. FERGENSON: Let me do the -- let me try to clarify search. "Search" under FOIA and "search" as defined in Mr. Wachter's declarations has three parts. One is somebody is sent to look. They look. They report back. And this is what Mr. Wachter defined. This is common sense. Didn't find any records, or, here are the records. Mr. Wachter collects them, that's his job. Then he turns over all responsive records, after reviewing for privilege and other exemptions, to us. A search that doesn't give us responsive

documents is no search under FOIA. We're supposed to get the documents. A search, and I described it as a tree falling in an empty forest where somebody goes out and searches and doesn't tell Mr. Wachter -- no records or here are the records -- is no search at all. That is exactly what Mr. Wachter in both -- in his declarations describes.

He says there was a -- this is what we do to search. We go out, they come back. And we have a report from everyone. We've been very diligent, okay? They have told us, no, there are no records. But they've given us the records. Then we discovered we need to do a further search. That is the lie.

Ms. Shaw in her declaration proves that lie. She never reported back -- that was the transcript of the deposition testimony that you referenced, and that we did from Mr. Newton. She went out and she never came back -- never came back with a response and never came back with the documents. That's how it merges. The July 24th Wachter deposition at Paragraph 21 is a flat out falsehood.

As part of finalizing the documents for the Court's April 30th, 2013 filing deadline for summary judgment, my office carefully reviewed the documents search that was performed between October 23, 2012 and January 25, 2013. In the course of this review, on April 29th, 2013, my office determined that the search for documents from the former

administrator, the deputy administrator and the chief of staff in the office of the administrator may have been insufficient.

In the interest of a complete and adequate response to plaintiff's request, the EPA determined that another search would be required of the accounts, plural, of the former administrator, deputy administrator and chief of staff in the office of the administrator. That is false. There was no documents found. Here are the documents from Ms. Shaw. There was no search. And what he's representing to the Court is that there was a search, but we have to do another search of the deputy administrator. And they were in a panic.

The testimony is that they stood over -- I can't remember whose desk they stood over -- and said: You do this search. We got a search. General counsel just put together a string search, do it of the deputy administrator because it hasn't been done yet. They knew and they lied to this Court and to us in doing so.

In the 5/15 deposition at paragraph -- they cited to paragraph -- well, Paragraph 15, the initial document collection was closed -- this is the Wachter declaration, Document 30-1 filed May 15th, the other one was filed July 24th -- was closed on January 25th, 2013. At that point my office had received a no records response or had coordinated the collection of documents from the immediate office of the administrator. By the way, Your Honor, the

immediate office of the administrator is the administrative -- deputy administrator and the FOIA coordinator. There's a little bit of a gliding over, an allusion, by counsel for the Government.

The office of the administrator included Mr. Newton but is shown by his 22-day later e-mail. He said, I should have sent this to you earlier and nothing stopped him, and it was the same e-mail, other than, you know, they should remember this. Other than that, it was exactly the same e-mail that he sent to Ms. Shaw and to the FOIA coordinator for the administrator. He could have added their names when he sent the initial one. He was in the office of the administrator but not in the immediate office of the administrator.

This is a representation. He had received a no records response, Paragraph 15, or had coordinated the collection of documents from the immediate office of the administrator and various other places. My office determined that the remaining headquarters offices had not yet provided a response that had not yet provided a response, and he listed 1, 2, 3, 4, 5, that are not the immediate office of the administrator and were not likely to have responsive records. Those offices do not ordinarily engage in the agency's rule making activities. That is false.

He had received no "no records response". He had

received no documents from the deputy administrator who was in the immediate office of the administrator. No search, as he defines it, had been accomplished. If Nina Shaw was doing this on her own and she never got to him, he could not have lawfully and appropriately signed the declaration that said: My office has carefully reviewed it and we got everything we needed from the immediate office of the administrator. That is a lie.

And he compounds the lie, Paragraph 19: In the course of finalizing the materials for this deadline, my office determined -- determined that the search for documents from the former administrator, the deputy administrator and the chief of staff in the office of the administrator may have been insufficient. There was no such search that he -- that had been completed pursuant to his operations. He knew of no such search and there wasn't.

In the interest of a complete and adequate response, the EPA determined that another search would be required. In fact, when they all huddled around -- and this is described in one of the depositions -- when they all huddled around the computer monitor, they knew -- the people standing there knew that this was the first search of the DA's files. And that general counsel's office was brought in because they needed a search term fast in order to try to do something.

Another search would be required of the accounts of the former administrator and deputy administrator and chief of staff in the office of the administrator. Now, I'm not sure why there has been no factual finding in the -- why that was urged by the Government, I assume in Judge Collyer's case, I assume that is designed to limit the -- the collateral estoppel effect of her findings.

Now, on the memory test, why did we not ask them: Do they remember, among all their duties, whether anyone ever told them from the White House or from other agencies, the Department of Interior, or communicated to them in government or out of government, because the first request is very broad. It was never -- and I lock this down in the depositions -- it was never limited, the "for political reasons," no one reading the first request as opposed to the second request, there was a space between them, they were independent requests.

No one would have applied a responsive document production -- or responsive document request for political reasons to the first. It is not reasonable. It is not accurate. It is not fair. It is not just. It is a pretense. It is because these are very busy people. It is not a matter of who called them up or who said, you know, we're going to delay this, or you got to go back to Mr. Sunstein or, you know, redo the economic impact analysis. We cannot expect them to remember that. That's why they're documents. They

can't fudge.

Documents are hard documents. That's why the litigation hold memo that was right -- if we're not going to audit -- this is not an FRA case, we were entitled to the documents and we were not entitled to the memory of events that happened two or three years before when they deal in thousands of e-mails, thousands of text messages.

And I wasn't entirely clear, the "for political reasons" was applied to both one and two, and now we have an admission that it was applied to that. We don't know who said it, but it was applied to that. Now, we have not completed the review of the documents, it's now three years on -- I think three years on, two years on, that were last produced about -- on January 8th whenever that was, about two weeks ago, two to three weeks ago.

The records produced, I'm advised by my colleagues who have looked at them, demonstrate a close monitoring of regulations by EPA. Records are redacted based on the deliberative process exemption, so we don't know how much of the discussion was beyond the fact that regulation issuance was just a large concern of EPA. It is fair to infer that EPA officials were concerned about the pace of issuance. We have not had the opportunity to test the exemption assertions, we will do so promptly.

The records also demonstrated regular meetings

between EPA officials and OMB OIRA officials, that's the office that Mr. Sunstein headed up, and also regular communication via e-mail. I believe that I responded to each of the assertions by the Government. If the Government -- I'm sorry, if the Court seeks further assistance by Landmark, we will of course provide it.

And if there is a filing schedule that the Court would like to have on the attorneys' fees, I think we have provided a public service, and I think that our interest -- we have not flagged in our interest over 14 years, so I think we're entitled to them. We will do whatever the Court suggests is appropriate to not only vindicate our own interests but also to flesh out issues either in briefing or other procedures that would further inform the Court with respect to vindication of its interest.

Thank you, Your Honor.

THE COURT: All right. Thank you very much.

MS. GRAHAM-OLIVER: Your Honor, if I may. Counsel made a statement in his presentation that the wording "for political reasons" was applied to both the first and the second part of the FOIA request. That is absolutely untrue. If you look at Mr. Wachter's declarations, both the initial declaration, which was filed on May 15, 2013, as well as the supplemental declaration, it is clear on Page 7, Paragraph 16, that records were deemed to be responsive to the plaintiff's

FOIA request if they were either -- if they either memorized a meeting, communication with or contact with an outside party related to a rule that was proposed but not finalized during the timeframe identified by plaintiff, not including -- not including standard interagency review of proposed rules or formal comments on rule making dockets.

There was no added "for political reasons" for part one at all. The "for political reasons" was added on part two, which pertained to delaying a rule making until after the election of 2012 or after November 2012, quote, "for political reasons." That is in Mr. Wachter's declarations. That is what we argued in our May 15th motion for summary judgment, which was never challenged in plaintiff's opposition to the defendant's motion for summary judgment.

Thank you, Your Honor.

THE COURT: All right. I'll consider the current motion submitted and I'll rule as promptly as I can. I would like the plaintiffs, if you would do me the courtesy, since the rest of my file is in D.C., of filing those exhibits to the depositions -- just with the notice of filing, something like that, it will help me, because I have everything otherwise that I need here.

MR. FERGENSON: We will cross-reference going the other way.

THE COURT: Good.

MR. FERGENSON: From the depositions into the memorandum exhibits.

THE COURT: Okay. I appreciate that.

MR. FERGENSON: Thank you, Your Honor. Shall we proceed, if the Clerk's office has no objection, if the Court has no objection, if the Government has no objection, to providing it by letter? I know the Court has specific rules about that.

THE COURT: I would just do a notice of filing.

MR. FERGENSON: Notice. Okay. We will do a notice.

THE COURT: So it's on the record and everybody sees it. I would say, this is the first time I've try to do one of these teleconference hearings, and this worked very well for me, I could hear both of you all very fine. Did this work for you all as well?

MR. FERGENSON: Yes, Your Honor. It's fine.

THE COURT: I know sometimes you couldn't hear when I was --

MS. GRAHAM-OLIVER: Yes, Your Honor.

MR. FERGENSON: Speaking as not an early adopter, it was very comfortable.

THE COURT: Thank you all very much, Counsel. The Court will be in recess.

END OF PROCEEDINGS AT 12:20 P.M.

C E R T I F I C A T E

I, Lisa M. Foradori, RPR, FCRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date:_____ _____

Lisa M. Foradori, RPR, FCRR

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